

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF  
BRASFIELD & GORRIE, LLC

Respondent

And

Case No: 09-CA-199567

UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA (UBC),  
INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS  
LOCAL 8-719

Charging Party

**UNION'S EXCEPTIONS BEFORE THE BOARD**

**1** The Administrative Law Judge erred by using the wrong standard in the application of his decision. Under *National Steel*, 324 NLRB 499 (1997) the Board requires that an employer apply an objective standard when engaging in photographing and videotaping employees' activity. In *National Steel* the Board rejected the Administrative Law Judge's statement that an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity, Rather, under the legal principles, the employer must show that it had a reasonable objective basis for anticipating misconduct. *National Steel*, p. 499, fn 4) **In reference to ALJ Decision pp. 4-28.**

**2** The Administrative Law Judge erred in stating in his decision that safety manager Wickham did not take photographs and videos because he anticipated the employees' misconduct, but rather, that he took the photographs and videos while the misconduct was occurring. **In reference to ALJ Decision pp. 30-38.**

Respectfully submitted,

Eric J. Gill  
Attorney  
Suetholz and Associates  
3042 Irvella Pl.  
Cincinnati, Ohio 45238  
Rick.22@live.com



This case involves an unfair labor practice charge alleging that Respondent violated Section 8 (a)(1) of the Act by creating an impression of surveillance when Respondent's senior safety manager, John Wickham, took pictures of employees as they gathered in front of Respondent's jobsite. The amended charge further alleges that about May 25, 2017, Respondent, by John Wickham, engaged in surveillance of its employees by taking pictures and videotaping employees as they gathered outside Respondent's jobsite.

During the time that Respondent engaged in surveillance of the employees, employees who worked for Respondent and for its subcontractors, PCC and PDC, were protesting wages and other terms and conditions of employment. Such protests and subsequent picketing by the employees were protected and concerted activities. See *Triad Management Corporation*, 287 NLRB 1239 (1988); *Atlantic Scaffolding Company*, 356 NLRB No. 113 (2001) The conduct that occurred on May 24 and 25, 2017 created fear among the employees to the extent that a couple of days later the employees who had gathered and picketed in front of the jobsite, returned to work in fear of losing their employment.

The Board and courts have long held that photographing employees or videotaping employees by an employer such as in this case violates the Act since photographing employees creates fear among the employees of future reprisals. *National Steel*, 324 NLRB 499 (1997). In *F. W. Woolworth*, 310 NLRB 1197 (1993) the Board held that photographing employees in the mere belief that something might happen does not justify the employer's conduct when balanced against the interference of employees' right to engage in concerted and protected activity. Rather, the inquiry is whether photographing or videotaping employees has a reasonable tendency to interfere with the employees' protected activity. *Sunbelt Mfg.*, 308 NLRM 780 (1992).

In this case, Respondent admitted that it had photographed and videotaped employees while they were engaged in protected and concerted activities. The fact that Respondent was concerned with

safety issues and had a safety policy does not justify its actions in photographing and videotaping employees while they engaged in protected and concerted activities. The evidence is clear in this case that during the times Respondent engaged in photographing and videotaping employees, no incidents had occurred that would warrant the documenting or recording of employees' actions as they engaged in their protected and concerted activities.

#### THE FACTS

Respondent, Brasfield & Gorrie, is a general contractor for the Omni Hilton construction project in downtown Louisville, Kentucky. Respondent began working on the project in early 2016. The construction is scheduled to end in early 2018. PCC and PDC are two subcontractors that work under Respondent at the site. In May 2017, employees contacted the Carpenters Union after they became aware that they were being paid less than other craft workers at the jobsite. (Tr. p. 14) Several employees for PDC talked to Union lawyer David Suetholz, who advised them he would meet with them to advise them of what they could do. Suetholz explained that the employees could gather together and approach management to rectify the apparent wage issue. (Tr. p. 56, 57)

On May 24, 2017, the employees met Suetholz in front of the PDC office on Third Street, across from the Omni jobsite. (Tr. p. 58, 59) When the Union representative, Marco Cruz, met with the PDC representative, he was informed that the wage issue had to be addressed with Brasfield management. At some point during that day, May 24<sup>th</sup>, employees who were standing in front of the PDC office, were

told that Brasfield was willing to talk to them inside the project. At this point several employees went into the project site, across from where they were standing, and spoke to a representative of Brasfield. However, nothing was resolved over the wage rates that day. (Tr. p. 62, 63)

On the next day, May 25, 2017, employees from PDC, along with their attorney Suetholz, met again in front of the PDC office. On May 25, 2017, some of the employees who were gathered in front of the PDC office held picket signs with the wording – “Brasfield & Gorrie ULP strike.” The employees stood on the sidewalk and remained there until about 3 pm on the 25<sup>th</sup>. Luis Estrada Trejo was one of the employees who had gathered outside of the PDC office on the 25<sup>th</sup>. Trejo was an employee of PDC and was concerned about the wage disparity between him and other employees working at the jobsite. (Tr. 27) Cruz talked among other employees about their wages and how they were less than the wages of other employees who worked at the jobsite and it was decided among the employees to contact the Carpenters Union to see what rights the employees had. Employees then met on May 24<sup>th</sup> and gathered in front of the PDC office on Third Street across from the jobsite. (Tr. 109) After owners of PDC advised Cruz and the employees that they could not address the wage issue, and told them that the employees had to talk to Brasfield about the wage issue, Cruz and the other employees decided to picket the jobsite. The employees remained outside the PDC office across from the jobsite for the remainder of the day or for about 8 hours. (Tr. 110)

During the time that Cruz and the other employees stood outside the PDC office, Cruz saw John Wickham, safety manager for Brasfield, at the main entrance of the jobsite. Cruz noticed that Wickham seemed upset as he stood across the street from the employees. Cruz saw that Wickham had a phone and was videotaping the employees as they stood across from him. Wickham was moving the phone side to side as he was videotaping the employees. Cruz testified that prior to that time, he had not seen Cruz photographing or videotaping him or other employees. Cruz testified that he recalled the incident

well, and recalled that Wickham's videotaping of the employees occurred about 9 a.m. or in the morning. (Tr. 112-116)

On May 25, 2017, Cruz and the other employees gathered again in front of the PDC office. Some of the employees crossed the street to stand on the corner of Third Street on the sidewalk where they remained the rest of the day. (Tr. 118, 119) Cruz testified that on May 25, 2017, about 50 employees who had gathered in protest carried picket signs that read on strike for "bad labor practice." (Tr. 123, 124)

Zavala Mendoza was one of the employees who gathered with other employees outside the PDC office on May 24, 2017. (Tr. 128-130) During the time Mendoza was in front of the PDC office on May 24, he saw John Wickham who was on one of the floors of the project taking pictures or videotaping the employees as they stood across the street in front of the PDC office. (Tr. 132, 133, 137) Wickham was holding his camera in front of him and was moving it with his two hands taking pictures of the employees gathered in front of the PDC office. (Tr. 133)

Arturo Mendoza Gil was one of the employees who had gathered on May 24, 2017, in front of the PDC office and who was protesting the wage issue. (Tr. 150-156) During the time Mendoza Gil was standing in front of the PDC office, he saw several people from Brasfield and other companies with their phones near their faces. (Tr. 155-156) Mendoza, who was gathered with the other employees in front of the PDC office, and who participated in the wage protest on both May 24 and 25, saw people with their phone near their faces on both days. On May 24<sup>th</sup>, Mendoza saw two or three people with their phones near their faces, and on May 25 he saw three or four people doing the same thing. Mendoza recognized one of the people as a woman from the office. Prior to May 24 and 25, 2017, Mendoza had not seen anyone from Brasfield or the contractors taking pictures of the employees. (T. 156, 157)

John Wickham senior safety manager for Brasfield testified on behalf of Respondent. (Tr. 175, 176) As safety manager, Wickham manages the safety policies for Brasfield and other subcontractors that worked on the Omni jobsite. (Tr. 175 – 223) Part of his duties includes attending various safety meetings at the jobsite for both employees who work at the site as well as for managers. (Tr. 215- 223) Wickham testified that as safety manager, he takes pictures and videos of safety incidents on the jobsite. As an example, Wickham takes pictures of employees who have accidents on the job and includes the pictures in the project manager's report. (Tr. 225 228)

Wickham testified that he typically meets employees as they enter the jobsite before going to work, and testified that if the workers know he cares about them, they will feel safe; but also meets them to see if they are prepared to go to work. (Tr. 229. 230) In May 2017, employees regularly used the entrance to the jobsite located at the corner of Third Street and Muhammad Ali. (Tr. 234) On May 24, 2107, Wickham appeared at that entrance and saw that people were gathering across the street. Wickham testified that he had not seen that in the past or before the May 24 and 25 incidents. Wickham testified that there were about 70 people gathered in front of the PDC office building and testified that the gathering was unusual. He observed that the people remained standing there all day or until about 3 p.m. (Tr. 241) The next day, May 25, 2017, Wickham was again at the entrance to the project and again saw a group of people standing in front of the PDC office building across from the jobsite. (Tr. 243, 244) Wickham testified that during this time he saw someone who worked for the Union handing out white cards to the people standing in front of the building. (Tr. 246) Wickham then saw some of the people carrying picket signs. Wickham testified that he saw union people driving Ford Explorers and saw a "giant union semi-truck and trailer" drive by the area. (Tr. 247, 248) Wickham then saw some of the employees who were in front of the PDC building walk down the street and then crossed the street near the corner where they picketed on the sidewalk near the corner. (Tr. 248, 249)

Wickham also saw a delivery truck try to turn into the jobsite, but that the truck was impeded in gaining access to the jobsite. (Tr. 251)

Wickham testified that as he stood near the entranceway to the jobsite, he began taking pictures of employees and trucks near the jobsite. (Tr. 259 – 264) After Wickham saw the Union vehicles, he called the police to report a disturbance in the area. Wickham then took a video of the Union vehicles as he waited for the police to arrive. As the police drove up near the Union vehicles, the Union representatives drove off. Wickham testified that during this time he videotaped the incident, but added that shortly afterwards he erased the video tapes. Wickham testified that after this incident he reported to someone at the jobsite about what had happened. Wickham testified that he had observed the employees who were picketing all day on May 25, 2017. (Tr. 261-264)

Wickham testified that during the time he took photographs and videos of the employees who were picketing in front of the jobsite, he did not see any safety incidents or accidents involving the employees engaged in the work stoppage; nor did Wickham see any safety incidents or accidents involving the Union vehicles. Wickham further testified that he did not believe the police issued any citations to the employees gathered in front of the jobsite or to the individuals who were driving the vehicles that Wickham identified as Union vehicles. (Tr. 275) --Wickham testified that he did not receive any complaints from anyone driving the delivery truck that Wickham believed was trying to enter the jobsite. (Tr. 275, 276) Although Wickham testified that he received complaints from some employees who could not use the crosswalks during the picketing, Wickham testified that he did not document the complaints. (Tr. 276) Wickham testified that after the incidents that occurred on May 24 and May 25, 2017, he did not recall whether anything concerning the incidents was mentioned during the regular safety meetings that were held by Respondent. (Tr. 280) Wickham testified that Brasfield has no responsibility for anything that may happen outside of the barriers or perimeters of the construction site. (Tr. 281)

Wickham testified that as he saw the employees picketing at the corner of Third and Muhammad Ali, he saw approximately 25 to 30 employees carrying picket signs that read – “Brasfield & Gorrie unfair labor...” In watching these picketing employees, Wickham took videos of them. Wickham testified that during this time, he observed no accidents or safety incidents related to the picketing employees. In fact, Wickham testified that he did not take pictures of any accidents that day. (Tr. 281 - 288) Wickham testified that when he went back into the building or project site and was on the 14<sup>th</sup> floor, he saw three vehicles being driven by Union people. Wickham testified that the Union people had been handing out white cards to people. Wickham testified that after he reported the vehicles that were in front of the jobsite to the police, the police came around the corner, and briefly talked to the people in the vehicles before the vehicles drove off. Wickham took a video of the vehicles. Again, Wickham testified that he believed no citations were issued to the people driving the vehicles. (Tr. 286, 288)

### **LEGAL ANALYSIS**

The facts in this case establish that Respondent was engaged in more than mere observation of employees during their wage protests on May 24 and 25, 2017. The Board in *National Steel and Shipbuilding Company*, 324 NLRB 499 (1997), citing *F. W. Woolworth* 310 NLRB 1197 (1993) reaffirmed the principle that while an employer’s mere observation of employees engaging in open, public union activity on or near its property does not constitute unlawful surveillance, an employers’ photographing and videotaping of such activity clearly constitutes more than mere observation. As the Board held, photographing and videotaping tends to create fear among employees of future reprisals. Moreover,

the principle as set out in *Woolworth* holds that photographing with the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity. This principle has been earlier established in *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), *enfd.* 401 F.2d 128 (7<sup>th</sup> Cir. 1968), *cert. denied* 393 U.S. 1019 (1969).

The principle enunciated by the Board and courts requires that an employer engaging in photographing or videotaping employees must demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. As the 7<sup>th</sup> Circuit Court held, the Board may properly require a company to provide a solid justification for its resort to "anticipatory photographing." *NLRB v. Colonial Haven Nursing House*, 542 F. 2d 691, 701 (7<sup>th</sup> Cir. 1976). As stated earlier, the employees who gathered in front of the job site and who picketed during May 24, and 25, 2017, were engaged in concerted and protected activity. The law is well settled that employees may engage in protected work stoppages to protest their terms and conditions of employment. *Washington Aluminum Co.*, 370 U.S. 9 (1962) In *Cambro Manufacturing Co.*, 312 NLRB 634 (1993), the Board held that employees are protected by Section 7 of the Act after they briefly engaged in a peaceful work stoppage when they presented their concerted complaint letter to the employer. See also *Triad Management Corporation*, *supra*, and *Atlantic Scaffolding Company*, *supra*.

Applying the above-principle in the instant case, the photographing and videotaping of employees at the main entrance to the jobsite on Third and Muhammad Ali, and in front of the PDC office building where the employees demonstrated openly, carrying picket signs, violate Section 8(a)(1) of the Act. The evidence adduced at trial failed to show that employees who were engaged in their demonstration engaged in any misconduct. This evidence was established through Respondent's witness, John Wickham, who testified that no citations (police or municipal) were issued against the employees who were engaged in picketing and demonstrating. Wickham, who admitted videotaping

union people driving union vehicles, testified that the vehicles caused no traffic accidents. Blowing horns and demonstrating in a loud manner, certainly absent a violation of a noise ordinance, does not constitute misconduct. The police, who were called by Wickham after he recognized the Union people driving their Ford Explorers, did not issue any citations against the drivers of the vehicles or the employees standing on the sidewalks. According to Wickham, the police merely stopped and engaged in a short conversation with the Union people and then drove away. Again, no citations, traffic or otherwise, were issued against the drivers of the vehicles or the employees who were standing on the sidewalks across from the project and at the entrance or the corner of Third and Muhammad Ali.

It must be concluded that Respondent's "anticipatory photographing and videotaping" of the union activity during the period of May 24 and 25, 2017, did not follow the principle enunciated by the Board and courts as defined above. Respondent's subjective belief that something may have happened as a result of the employees' demonstrating and picketing does not justify its actions to take photographs and videos of the employees' activities. (See Fn. 4, page 499 of the Board's decision in *National Steel*, supra). As stated, the Board does not accept or adopt an employer's subjective honest belief that it videotaped employees' activity, believing it to be unprotected, when the activity was actually protected. Moreover, Respondent failed to show at trial that it believed any of the actions conducted by employees during the May 24 and 25 time period were serious enough to report either internally or to outside authorities. As Wickham clearly testified, he erased all the pictures and video tapes of the demonstrations shortly after he took them.

The Board has held that an employer absent legitimate justification violates Section 8(a)(1) of the Act when it photographs and video tapes employees and fails to tell the employee why the employer was taking the photographs or was videotaping them. *Sunbelt Mfg., Inc.*, 308 NLRB 780 (1992). Here, no reports concerning the incidents were introduced at any of the safety meetings by Wickham or any of his safety representatives. There is no evidence adduced at trial that Respondent told employees

why it was photographing or videotaping them. Certainly, if Respondent was concerned with safety issues, either of its employees, or of its property, Respondent could have told employees why it was taking the videos of them. Such was not the case.

Respondent's reliance on a safety policy defense must be rejected. Wickham, the safety manager for Respondent, testified that he would on occasion walk through the building project and take pictures and videos of safety incidents, such as employee accidents, and other workers compensation issues. However, Wickham further testified that prior to the May 24 and 25 incidents, when he greeted employees at the gate or entranceway to the project, he never used his phone or camera to take pictures of the employees as they entered the jobsite. However, on May 25, 2017, after Wickham saw the employees gathering in front of the PDC building and at the entranceway to the jobsite, Wickham stood openly in view of the employees and took their photographs and video taped them as they picketed in front of him. Wickham's testimony that he was concerned with safety issues because of the numbers of employees gathered in front of the project is simply not credible. As confirmed by Wickham's own testimony, no safety incidents had occurred that would have caused a recordation by Respondent for liability or business purposes. Rather, Wickham who testified that he had never witnessed union activities in his past career, decided to photograph the employees and union people who were assembled, handing out "white cards" and who picketed near the jobsite. Such actions by Respondent do not comport with the principles as set out by the Board and courts in *National Steel* and *F. W. Woolworth*.

The Board's case in *Aladdin Gaming, LLC and Local Joint Executive Board of Las Vegas*, 345 NLRB 585 (2005) is distinguishable from the facts of the instant case. The Board's decision in *Aladdin Gaming* pertains to the mere observation by the employer's managers of employees as they met to discuss the union. In *Aladdin* no photographing or videotaping by the employer of employees had occurred. The instant case extends beyond mere observation by managers of employees. The facts in the instant case

correspond to the facts as set out in *National Steel* and *F. W. Woolworth*. The issue here is whether the photographing and videotaping of employees as they gather to discuss and meet with management about wages creates fear among employees of future reprisals.

Wickham testified that he took a video of the union people as they drove their vehicles down Third Street in front of the job site. The fact that Wickham took these videos from one of the higher floors of the jobsite does not alleviate the consequences that fear was created among the employees of future reprisals. Wickham testified that after taking these videos, he told other employees of Respondent about what he saw earlier in the day. The Board again held that such activity creates fear among employees. See *Fairfax Hospital*, 310 NLRB 299 (1993). In *Fairfax Hospital*, the Board held that the law does not permit an employer to identify individuals with the use of photographic devices or by videotaping them. While in the instant case there is no evidence that Wickham had identified any employees who participated in the assemblage and picketing activity, Wickham did testify that he recognized the drivers of the three Ford vehicles who drove down Third Street near the picketing employees as Union people.

The instant case is distinguishable from the facts set out in *Saia Motor Freight Line, Inc.* 333 NLRB 784 (2001), where the Board found the employer had a legitimate safety concern in photographing employees as they hand billed in front of the employer's gate. As the Board held in *Saia*, the employer only took the photographs after it became dissatisfied with the police's efforts in resolving the situation. Contrary to the facts in *Saia*, in the instant case, Wickham videotaped the Union vehicles before the police had actually arrived on the scene. Moreover, the police quickly resolved the apparent situation. In fact Wickham testified that he was satisfied with the resolution of the apparent traffic problem, and then immediately erased the video tapes that he took prior to the police department's involvement.

As stated above, Wickham testified that he believed the people who were driving the vehicles down Third Street in front of the jobsite were Union people. Wickham testified that he had seen the vehicles before and knew they belonged to the Union. A mere assumption on the part of Respondent that a safety issue could occur as a result of traffic conditions, does not give Respondent the right to video tape the individuals involved in the work protest. That activity constitutes actions out of the ordinary and has the tendency to chill the exercise of the employees' Section 7 rights. *Fairfax Hospital*. See also *Hoschton Garment, Co.*, 279 NLRB 565 (1986). The Board has held that while an employer has the right to maintain its premises for legitimate business purposes, videotaping as it relates to observing employees' activities has a lower threshold and the Board finds such action violates Section 8(a)(1) of the Act. See *Alle-Kiski Medical Center*, 339 NLRB 361 (2003). Certainly, in this case employees believed that something could have happened to them as a result of the pictures and video tapes taken by Respondent. After May 25, 2017, the demonstrations ended and the employees returned to work.

The facts in this case are also distinguishable from the facts set out in *Cable Car Advertisers, Inc.*, 324 NLRB 732 (1997) where the Board held that the employer had legitimate reasons to conduct surveillance of hand billers who intentionally impeded customers from purchasing tickets from the employer. Again, in the instant case there is no evidence that the employees who were gathered in front of the jobsite and who were picketing at the site or in front of the entrance to the jobsite deliberately caused misconduct or harm to Respondent's business. Although Wickham testified that he had talked to some employees who were concerned about getting to work on May 25, 2017, and testified that he saw a delivery truck stop and not enter the jobsite, such evidence is scant and carries little weight. In fact Wickham did not follow up with the incident involving the delivery truck, nor did he know the identity of the delivery company that tried to enter the jobsite. Moreover, Wickham did not testify further as to whether he had talked to employees, or completed an investigation, after some employees had expressed their concerns about not being able to enter the jobsite.

Based upon the entire record, it must be concluded that Respondent's photographing and video taping of the employees' activity on May 24 and 25, 2017, as they met and demonstrated their concerns over wage issues, and their attempt to meet with management in order to resolve the wage issue, violated Section 8 (a)(1) of the Act.

Because the Administrative Law Judge requested the parties in this case to brief their positions on settlement or compliance issues, the Union respectfully believes that only a mailing of a standard cease and desist Notice would remedy the violation committed by Respondent in its surveillance of its employees.

The evidence adduced at trial shows that many of the employees who worked for PDC and PCC, subcontractors for Brasfield, had discontinued their employment before the completion of the Omni jobsite. Many of the employees, not from the Louisville, Kentucky, area left the jobsite to work at other jobsites throughout the country. Respondent indicated it was only willing to settle the case before trial by posting Notices at the jobsite. Moreover, Respondent contends that because Brasfield, here the Respondent, is a separate company from PDC and PCC, it has no legal responsibility to notify employees from PDC or PCC by mailing to the employees of those contractors a Notice as a remedy of its 8(a)(1) violation.

Contrary to Respondent's assertion, the Board has long held that a statutory employer may violate Section 8(a) (1) of the Act with respect to employees other than its own. See *Fabric Services*, 190 NLRB 540 (1971); *New York New York, LLC*, 356 NLRB 907 (2011); *Nova Southeastern University*, 357 NLRB 760 (2011). In those cases the Board held that an employer may be liable for its 8 (a) (1) violations to employees of other firms. Such is the case here. Moreover, Respondent's contention that because Brasfield is not a joint employer with PCC and or PDC, it has no liability for its violation of the Act to the employees of PCC and PDC. Rather, as stated above, the Board has clearly held that a general

contractor can violate Section 8(a) (1) of the Act with respect to employees of its subcontractors. The Board has also long held that a mailing of Notices to employees in remedy of a violation after a business has gone out of business or moved to other locations is appropriate. Again see *Nova Southeastern University* on this issue. Accordingly, the Union respectfully requests that upon finding a violation in this case, Respondent be required to mail at its own expense notices to all employees and former employees of all contractors who worked at the Omni job site following the date of the violation.

### **Conclusion**

Under the above circumstances, the Union respectfully requests that the Administrative Law Judge uphold the allegations as addressed in the original and amended complaints. The Union further requests that the Administrative Law Judge fashion an appropriate remedy for this case.

Respectfully submitted,

Eric J. Gill  
Attorney  
Suetholz and Associates  
3042 Irvella Pl.  
Cincinnati, Ohio 45238

